UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2014 MSPB 14

Docket No. CH-0752-12-0237-I-2

Joseph P. Clemens,

Appellant,

v.

Department of the Army,

Agency.

March 10, 2014

Joseph P. Clemens, Des Plaines, Illinois, pro se.

Eric J. Teegarden, Esquire, Fort McCoy, Wisconsin, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The agency has filed a petition for review of the initial decision that reversed the appellant's removal for physical inability to perform the duties of his position and found that the appellant proved disability discrimination based on a failure to accommodate. The appellant has also filed a petition for review, arguing that he is entitled to compensatory damages and reiterating his assertion of harmful procedural error. For the following reasons, we DENY the appellant's

petition for review, GRANT the agency's petition for review, REVERSE the initial decision, and SUSTAIN the appellant's removal.[1]

BACKGROUND

¶2 The appellant was a Supervisory Public Safety Dispatcher with the U.S. Army Installation Management Command, Directorate of Emergency Services (DES), until his removal effective December 30, 2011. MSPB Docket No. CH-0752-12-0237-I-1, Initial Appeal File (IAF-1), Tab 3, Subtab 4a. The record reflects that the appellant suffered a significant loss of speech ability due to a stroke on March 11, 2011, and related complications on May 11, 2011. IAF-1, Tab 3, Subtabs 4i, 4k, 4m at 1, 4n at 3. Thus, the agency effected his removal for physical inability to perform the duties of his position. *Id.*, Subtabs 4a, 4b. Thereafter, he filed an initial appeal contesting the agency's action and asserting the affirmative defenses of harmful procedural error, retaliation based on protected activity, age discrimination, and disability discrimination. *Id.*, Tabs 1, 5. He did not request a hearing. IAF-1, Tab 1 at 2.[2] The administrative judge issued an initial decision based on the written record that reversed the agency's action and found disability discrimination. MSPB Docket No. CH-0752-12-0237-I-2, Initial Appeal File (IAF-2), Initial Decision (ID) at 1-3. The administrative judge found that the appellant did not prove his remaining affirmative defenses of age discrimination, retaliation, and harmful procedural error. ID at 4-5.

¶3 The agency has filed a petition for review, arguing that the administrative judge failed to properly consider the medical evidence detailing the appellant's

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[1] Except as otherwise noted in this decision, we have applied the Board's regulations that became effective November 13, 2012. We note, however, that the petition for review in this case was filed before that date. Even if we considered the petition under the previous version of the Board's regulations, the outcome would be the same.

[2] The administrative judge dismissed the appellant's I-1 appeal without prejudice pending resolution of his equal employment opportunity complaint. IAF-1, Tab 9.

inability to perform his key work duties, erred by relying on the appellant's assertion that the agency could have accommodated him, and failed to properly consider the appellant's position description. Petition for Review (PFR) File, Tab 1 at 2. The appellant has also filed a petition for review in which he attaches allegedly new evidence, requests compensatory damages, and challenges the administrative judge's finding concerning his affirmative defense of harmful procedural error.[3] PFR File, Tabs 2, 6. The appellant has also filed a reply brief to the agency's petition for review. PFR File, Tab 3.

ANALYSIS

The agency proved the charge of physical inability to perform the duties of the position.

¶4 In his analysis of the charge, the administrative judge cited *Slater v. Department of Homeland Security*, 108 M.S.P.R. 419, ¶ 11 (2008), for the proposition that, in order to remove an employee for physical inability to perform, the agency must show that the disabling condition itself is disqualifying, its recurrence cannot be ruled out, and the duties of the position are such that a recurrence would pose a reasonable probability of substantial harm. ID at 2. Because the appellant did not hold a position with medical standards or physical requirements subject to medical evaluation programs, *Slater* does not govern this appeal. IAF-1, Tab 7 at 28-33; *Fox v. Department of the Army*, 120 M.S.P.R. 529, ¶ 24 (2014).[4]

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[3] The appellant asserts that he was constructively discharged on October 31, 2011, but he does not identify any argument or evidence to support this assertion. PFR File, Tab 2 at 6. Further, the appellant does not challenge the administrative judge's findings on his retaliation and age discrimination claims, and we discern no reason to disturb them.

[4] The administrative judge did not have the benefit of *Fox* when he issued the initial decision.

¶5 Instead, in order to establish a charge of physical inability to perform in this matter, the agency must prove a nexus between the employee's medical condition and observed deficiencies in his performance or conduct, or a high probability, given the nature of the work involved, that his condition may result in injury to himself or others. *Fox*, 120 M.S.P.R. 529, ¶ 25 (citing *Marshall-Carter v. Department of Veterans Affairs*, 94 M.S.P.R. 518, ¶ 10 (2003), *aff'd*, 122 F. App'x 513 (Fed. Cir. 2005)). In other words, the agency must establish that the appellant's medical condition prevents him from being able to safely and efficiently perform the core duties of his position. *Fox*, 120 M.S.P.R. 529, ¶ 25. In determining whether the agency has met its burden, the Board will consider whether a reasonable accommodation exists that would enable the appellant to safely and efficiently perform those core duties. *Id.* However, for the limited purposes of proving the charge, the agency is not required to show that it was unable to reasonably accommodate the appellant by assigning him to a vacant position for which he was qualified; whether it could do so goes to the affirmative defense of disability discrimination or the reasonableness of the penalty. *Id.*

¶6 The core duties of a position are synonymous with its essential functions, i.e., the fundamental job duties of the position, not including marginal functions. *Fox*, 120 M.S.P.R. 529, ¶ 26; *see* 29 C.F.R. § 1630.2(n)(1). A job duty may be considered essential for any of several reasons, e.g., because the reason the position exists is to perform that function, because of the limited number of employees available among whom the performance of that job function can be distributed, or because the function is highly specialized so that the incumbent is hired for his or her expertise or ability to perform the particular function. 29 C.F.R. § 1630.2(n)(2). Evidence of whether a particular function is essential includes, inter alia, the employer's judgment as to which functions are essential, written position descriptions, the amount of time spent performing the function, and the consequences of not requiring the incumbent to perform the function. 29 C.F.R. § 1630.2(n)(3).

¶7 The agency argues on review that the administrative judge failed to consider the appellant's position description, which showed that "effective, timely, and accurate verbal communication" was a crucial part of the position. PFR File, Tab 1 at 6-7. We agree. In the notice of proposed removal charging the appellant with inability to perform, the proposing official stated that the appellant was "unable to perform the functional requirements essential to the duties of [his] position." IAF-1, Tab 3, Subtabs 4g at 4-6, 4i, 4k, 4m. The proposing official also stated, "The essential functions of the Supervisory Public Safety Dispatcher include significant verbal communication. Full performance of this function is essential to the mission of the agency." *Id.*, Subtab 4g at 5. The deciding official reiterated these statements in his decision letter, including his consideration of the *Douglas* factors.[5] IAF-1, Tab 3, Subtabs 4b at 3, 4c at 4.

¶8 According to the appellant's position description, his "Major Duties" included possible performance of Public Safety Dispatcher duties, such as providing "emergency police, fire and medical services to the public by answering emergency 911 calls and responding with appropriate personnel and equipment" and "Advanced Emergency Medical Dispatch Life Support through pre-arrival instruction to callers." IAF-1, Tab 3, Subtab 4l at 6-7. The appellant was required to spend 25% of his time on duties related to caller interrogation, including "crisis intervention with distraught emergency callers during high-risk situations" and "dispatch[ing] a variety of emergency equipment to include

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[5] In his consideration of the *Douglas* factors, the deciding official stated:

> Due to a severe and long term medical condition, Mr. Clemens cannot perform his duty functions on a regular, full time basis. These functions are essential to the accomplishment of the DES mission. His current medical documentation concludes that his medical condition requires extensive rehabilitation, recovery is long term, and his condition does not allow him to return to duty.

IAF-1, Tab 3, Subtab 4c at 2; *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 308 (1981).

police, fire, ambulance, Med-Evac, rescue or hazardous materials unit." *Id.* at 7. He also was required to provide emergency medical dispatching assistance to callers with medical emergencies, including the responsibility to initiate "immediate, appropriate, emergency response" and to provide "advanced life support," such as instructing callers on how to perform cardiopulmonary resuscitation, the Heimlich maneuver, or emergency childbirth and how to open an airway or control bleeding. *Id.* at 7-8. In such situations, he was required to maintain "continuous telephone contact" with the caller and give instructions "regarding what to do, and what not to do, prior to the arrival of pre-hospital care providers." *Id.* at 8. Further, a knowledge requirement for the position was "the ability to communicate orally." *Id.* at 9. Thus, we find that significant verbal communication was an essential function of the appellant's position.

¶9 As we discuss below, the appellant did not suggest or request an accommodation.[6] *See Fox*, 120 M.S.P.R. 529, ¶¶ 25, 28. The agency was not required to modify or eliminate duties that are an essential function of the position. *Johnson v. U.S. Postal Service*, 120 M.S.P.R. 87, ¶ 10 (2013). Further, there is a high probability, given the nature of the work involved, that his condition may result in injury to others. *See Fox*, 120 M.S.P.R. 529, ¶ 25. Because the agency has shown that the appellant's medical condition rendered him unable to safely and efficiently perform all the core duties of his position, we reverse the initial decision and sustain the charge. *See id.*, ¶ 30.

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[6] Even if we consider his doctor's suggestion that "perhaps text to voice" software might assist him with his speech limitations, we find that this is not a reasonable accommodation that would enable the appellant to safely and efficiently perform his core duties, particularly in light of the time-sensitive emergency and potentially life-saving functions of his position. IAF-1, Tab 3, Subtab 4k at 2.

The appellant did not establish that the agency discriminated against him by failing to accommodate his disability.

¶10 The Rehabilitation Act requires an agency to provide reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability unless the agency can show that accommodation would cause an undue hardship on its business operations. *White v. Department of Veterans Affairs*, 120 M.S.P.R. 405, ¶ 9 (2013); 29 C.F.R. §§ 1630.2(o)(4), 1630.9(a).[7] With exceptions not applicable here, the term "qualified" means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position the individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. 29 C.F.R. § 1630.2(m). Reasonable accommodation includes modifications to the manner in which a position is customarily performed in order to enable a qualified individual with a disability to perform the essential job functions, or reassigning the employee to a vacant position whose duties the employee can perform. *White*, 120 M.S.P.R. 405, ¶ 9; *Gonzalez-Acosta v. Department of Veterans Affairs*, 113 M.S.P.R. 277, ¶ 11 (2010).

¶11 We find no error in the administrative judge's conclusion that the appellant is an individual with a disability because he was substantially limited in the major

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[7] As a federal employee, the appellant's disability discrimination claim arises under the Rehabilitation Act. *White*, 120 M.S.P.R. 405, ¶ 9 n.4. The Rehabilitation Act incorporates the regulatory standards for the Americans with Disabilities Act (ADA) set forth at 29 C.F.R. part 1630. 29 U.S.C. § 791(g); 29 C.F.R. § 1614.203(b). The ADA Amendments of Act of 2008 (ADAAA), which liberalized the definition of "disability," became effective on January 1, 2009, and the amended regulations implementing the ADAAA became effective on May 24, 2011. Pub. L. No. 110-325, 122 Stat. 3553 (2008), *codified at* 42 U.S.C. § 12101 *et seq.*; 76 Fed. Reg. 16978, 17000 (Mar. 25, 2011). Because the appellant's removal took place after the ADAAA and its implementing regulations became effective, we will apply the current regulatory definition of a "qualified individual with a disability." *See* 29 C.F.R. § 1630.2(m).

life activity of communicating. ID at 4; 42 U.S.C. § 12102(2)(A); 29 C.F.R. § 1630.2(g). The administrative judge did not make a finding, however, concerning whether the appellant was a qualified individual with a disability; that is, whether he could perform the essential functions of his position, or a vacant funded position to which he could be assigned, with or without reasonable accommodation. 29 C.F.R. § 1630.2(m); *see Jackson v. U.S. Postal Service*, 79 M.S.P.R. 46, 53 (1998). In this regard, the appellant did not present any evidence to support his argument that he could perform the essential duties of his position with or without an accommodation. The medical records from his physicians are conclusory and unspecific as they merely suggest that the appellant might be accommodated through "text to voice." IAF-1, Tab 3, Subtabs 4i, 4k at 2 (indicating that "[p]erhaps text to voice" would accommodate the appellant). Additionally, the appellant did not provide any argument about or evidence of his ability to perform in a vacant funded position to which he could have been assigned. Thus, the evidence before us does not support a finding that the appellant was a qualified individual with a disability.

¶12 Additionally, we find that the agency did not fail to provide a reasonable accommodation because the appellant neither requested accommodation nor adequately provided information concerning his ability to return to his position with an accommodation. A disability discrimination claim will fail if the employee never requested accommodation while employed. *Paris v. Department of the Treasury*, 104 M.S.P.R. 331, ¶ 17 (2006). Nonetheless, an employee only has a general responsibility to inform his employer that he needs accommodation for a medical condition. *Id.* Once he has done so, the employer must engage in the interactive process to determine an appropriate accommodation. *Id.*

¶13 The appellant informed the agency of his physical limitations during the recovery period and requested to be advanced leave and placed in the leave donation program. IAF-1, Tab 3, Subtab 4m. The agency advanced 240 hours of sick leave and placed the appellant in the leave donation program. IAF-1, Tab 3,

Subtabs 4h, 4j. On June 13, 2011, the agency issued a formal request for medical documentation. *Id.*, Subtab 4l; *see* IAF, Tab 7 at 45 (the appellant's request for additional time to respond). In response, the appellant submitted two medical evaluation forms completed by his physicians, dated June 21, 2011, and June 24, 2011. IAF-1, Tab 3, Subtabs 4i, 4k. It does not appear that the appellant submitted any other medical documentation to the agency.

¶14 The appellant asserted that the medical evaluation forms contained his request for an accommodation and that the agency failed to meet its obligation to engage in the interactive process. IAF-1, Tab 3, Subtabs 4i, 4k, Tab 7 at 177, 181; PFR File, Tab 3 at 6. In response to the question on the medical evaluation form concerning what specific accommodation would be required for the appellant to perform the essential functions of his position, Dr. Tim Mikesell responded, "He has difficulty [with] speech," and Dr. Andrey Lev-Weissberg responded, "Perhaps text to voice." IAF-1, Tab 7 at 177, 181 (the appellant indicated that these were requests for accommodation). In response to the question of what type of work the appellant could perform within his medical restrictions, if he was not able to perform the essential functions of his current position, Dr. Mikesell responded, "A position without significant talking." *Id.* at 177 (the appellant indicated that "this would be reassignment"). Dr. Lev-Weissberg responded, "His speech is affected so I do not know what other devices are available to help [with] verbal communication. Typing or other secretarial work is ok." *Id.* at 181. The appellant does not point to any other evidence indicating that he requested accommodation.

¶15 We find that the statements in the above documents do not constitute a request for an accommodation. The statements made by the appellant's doctors were terse and unspecific answers to the medical documentation questionnaire sent by the agency and would require the agency to extrapolate an intent to request accommodation and return to work. There is no indication in the record that the appellant expressed an intent or desire to return to his position at any

point prior to his removal. In fact, in his response to the agency's proposed removal, the appellant indicated that he submitted and requested a continuation of pay while he "continue[d] to recover from [his] stroke" and had applied for immediate disability retirement. IAF-1, Tab 3, Subtab 4d. He did not indicate that he believed he could perform the duties of his position, with or without accommodation, nor did he express a desire to return to work. *Id.*

¶16 Further, in their witness statements from the appellant's equal employment opportunity (EEO) complaint, the proposing and deciding officials stated that they had not received anything from the appellant or his doctor requesting reasonable accommodation, nor had they received information from the appellant's doctors about the appellant's work abilities. IAF-1, Tab 7 at 85-86. They also submitted affidavits, stating: "Mr. Clemens made no request for a reasonable accommodation." IAF-1, Tab 6, Exhibits A, B. The appellant points to the language in the EEO witness inquiry in which the proposing official "stated the aggrieved could have been provided something for his speech." IAF-1, Tab 7 at 85-86.[8] This statement, however, does not demonstrate that the appellant requested accommodation prior to his removal or that the agency could have reasonably accommodated him. *See Paris*, 104 M.S.P.R. 331, ¶¶ 16-21 & n.2 (finding that the appellant requested accommodation by promptly providing additional medical information on the nature of his disability and by indicating his interest in finding a reasonable accommodation, which was supported by record evidence including a declaration made under penalty of perjury).

¶17 Furthermore, even if the appellant had requested reasonable accommodation, an agency's failure to engage in the interactive process alone does not violate the Rehabilitation Act; rather, the appellant must show that this

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[8] The agency argues that it did not have a chance to rebut the appellant's argument regarding this statement prior to the close of the record below. PFR File, Tab 1 at 6. Regardless, this statement does not change the outcome here.

omission resulted in failure to provide reasonable accommodation. *See Gonzalez-Acosta*, 113 M.S.P.R. 277, ¶¶ 16-17. The appellant bears the burden of proving that an accommodation he seeks is reasonable. *See Paris*, 104 M.S.P.R. 331, ¶ 24. His mere assertion that the agency could have allowed him to use computerized software is insufficient to meet his burden that such an accommodation existed and was reasonable. *See Gonzalez-Acosta*, 113 M.S.P.R. 277, ¶ 13. Further, the appellant bears the ultimate burden of proving that there was a position the agency would have found and could have assigned to him if it had looked. *See Nanette v. Department of the Treasury*, 92 M.S.P.R. 127, ¶¶ 16, 46 (2002). The appellant did not identify any available positions, and his assertions that the agency could have reassigned him are insufficient to meet his burden of proof. *See Massey v. Department of the Army*, 120 M.S.P.R. 226, ¶ 12 (2013). For the foregoing reasons, we find that the appellant failed to establish disability discrimination.[9] Accordingly, we REVERSE the initial decision's finding of disability discrimination.

The appellant's removal promotes the efficiency of the service.

¶18 Generally, removal for physical inability to perform the essential functions of a position promotes the efficiency of the service. *D'Leo v. Department of the Navy*, 53 M.S.P.R. 44, 51 (1992). The record reflects that the appellant's medical condition required long-term recovery and rehabilitation, without a foreseeable end to his incapacity. Further, the medical documentation he provided to the agency did not support his ability to return to duty. IAF-1, Tab 3, Subtab 4c at 2, 4, Subtabs 4d, 4h, 4i, 4k, 4m. Thus, we find that the agency's action was taken for such cause as will promote the efficiency of the service. *See Fox*, 120 M.S.P.R. 529, ¶ 40.

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[9] Our analysis includes consideration of the appellant's arguments in his supplement to his petition for review. PFR File, Tab 3.

The appellant's arguments and evidence on review do not warrant disturbing the initial decision.

¶19 The appellant attaches additional materials to his petition for review, argues that the administrative judge erred in failing to award compensatory damages, and reargues that the agency engaged in harmful procedural error. PFR File, Tab 2 at 1-4. First, we have reviewed the materials that the appellant submitted for the first time on review, and we find that they do not affect the outcome of this appeal.[10] Second, in light of our disposition, the appellant is not entitled to any damages. Finally, the appellant does not identify a specific objection to the administrative judge's harmful procedural error analysis, and we discern no error in the administrative judge's conclusion that the proposing official was authorized to propose the appellant's removal. ID at 5.

¶20 For the foregoing reasons, we reverse the initial decision and sustain the appellant's removal.

ORDER

¶21 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

[10] We have considered the compact disc that the appellant has attached to his petition for review. PFR File, Tab 2 at 5, 11. Although the appellant indicates that it demonstrates stress within the workplace, we do not discern any reason to disturb the initial decision based on this evidence. Further, with respect to the two affidavits that he submits for the first time on review, the appellant has not demonstrated that the information contained in the affidavits is new and was unavailable despite his due diligence, and we find that they, too, provide no reason to disturb the initial decision. *See Grassell v. Department of Transportation*, 40 M.S.P.R. 554, 564 (1989); *Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If

you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f) and 29 U.S.C. § 794a.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.